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Dispute Resolution Under a North American Free Trade Area: The Importance of the Domestic Legal Setting

*by Robert E. Hudec**

The first thing that must be considered when discussing the dispute settlement provisions of the North American free trade agreement is the domestic legal effect of that agreement. What force will this agreement have in the domestic law of the two countries involved?

Canada and the United States each have very effective legal systems. To the extent this agreement is incorporated into those legal systems, it will benefit from powerful enforcement remedies in the hands of the parties who have interests in the agreement. Before we can make any judgments about what kind of dispute settlement provisions are needed in the agreement, we ought first to focus on what these domestic legal effects are going to be.

My contribution to this subject will be a discussion of the U.S. law which pertains to the legal implementation of international trade agreements.

The tradition in the United States is that major trade agreements are non-self-executing agreements. They do not of themselves have any force in the domestic law of the United States. They are agreements which have to be implemented by the process of domestic legislation, or some other domestic lawmaking activity.

For agreements which pertain to tariffs, the United States has had the same system since 1934. Advance legislation gives the President authority to negotiate, and also gives him authority to reduce tariffs, by proclamation, to the extent necessary or appropriate to carry out the trade agreement commitments he has made. The President then proclaims the tariff reductions called for by the trade agreement. These tariff reductions have the force of domestic law. That is, importers are legally entitled to the new tariff treatment, and officials of the Executive Department are legally bound to observe that treatment.

Now, what happens if the proclamation that the President has made does not fully carry out the international obligation? This is where the "duality" of the American legal system comes into play. The international agreement itself has no legal effect. If the domestic law which proclaims authority has expired, the President no longer has authority to change the tariff. He must go back to Congress to get new authority.

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This same picture comes out very strikingly with regard to non-tariff barriers in the Trade Agreements Act of 1979, the Act which implemented the Tokyo Round. There were some fourteen non-tariff barrier agreements in addition to the tariff agreements reached in the Tokyo Round — “codes” on procurement, antidumping, countervailing, valuation, and technical standards, to name the most important.

Congress required that the text of all of those agreements be submitted to it. It then wrote, in Section 2 of the Act, a provision which said that it “accepted” those agreements. What did accepted mean? Well, the next section indicated that accepted meant very little, because it provided that these agreements shall have absolutely no force in the internal law of the United States. They create no cause of action. They bind no executive official. They mean nothing at all, except that we have accepted them. This was duality with a vengeance.

How did Congress provide for implementation? It said, “We, the Congress of the United States, will implement this agreement with domestic legislation.” Statutes were passed to cover each of the agreements that needed implementation. Congress also looked at those agreements which did not require new statutory authority, and insisted that the Administration submit something called Statements of Administrative Action saying how the latter was going to comply.

The most interesting part of this particular legal structure was the congressional attitude toward dispute settlement. Dispute settlement was one of the major items of the United States agenda in the Tokyo Round negotiations. In the 1974 legislation that authorized U.S. participation in the Tokyo Round, Congress itself had stipulated that one of the results it wanted to achieve from the negotiations was a more effective dispute settlement procedure in GATT; effective in the sense of both giving parties an automatic right to a legal ruling and having legal force behind those rulings.

Now, having said that it wanted international adjudication of legal disputes, Congress came back in 1979 and said it wanted total control over implementation. All through the 1979 Act, however, there are indications that Congress still regarded international dispute settlement rulings as binding determinations of the international obligations of the United States. Then, what was to happen if, subsequent to passage of the statute, there were a dispute settlement determination by the authorized tribunal which said that the United States legislation is in violation of its obligations?

The 1979 Act gives a very clear answer. The President must tell Congress about it and then Congress will decide what to do. Indeed, that holds true not only as to legislation which is in conflict, but also as to administrative action. If the President would have the power, generally, to change the Administration’s conduct in order to comply, he really shouldn’t do that. He should go to Congress first and ask their permission.

What does this mean then about the congressional view of international obligation under the 1979 Act? One part of the Act gives an interesting clue as to the conceptual structure with which Congress was approaching these obligations. The Standards Code was the code that said that governments should not create technical standards which create an undue burden on international commerce. In implementing the Standards Code, Congress set up a procedure for handling U.S. violations. It provided that if an authorized dispute settlement mechanism concluded that a United States agency had violated the agreement, the Executive Branch was required to hold a meeting, and at that meeting it was required to determine whether or not it would comply.

The legislative history on this point supplies the key. It says that the Executive must determine whether it should comply, *or not comply and accept retaliation*. Note that Congress recognized the validity of the legal determination, because it recognized the validity of retaliation based on violation of obligations. But, it seems to be saying that that is all an international obligation means. All it means is that you have to *pay* for your sin. It does not mean that you *cannot* sin, but only that you have to pay for it. In GATT circles, this is known as the French view.

In the negotiations for a Canada-U.S. free trade agreement, a great deal of attention has been focused on the binding quality of international dispute settlement agreements. The point of this story about the 1979 Act is that saying "binding" does not necessarily mean "binding." One must always ask another question: What does binding mean in terms of the domestic implementation procedures in each country?

The issue of domestic implementation breaks down into several important questions. The first is what I shall call the extent of domestic legal commitment. There are two ways that a Congress or a Parliament can implement an international agreement. Under one approach, the Legislature or Parliament can legislate the standards directly, saying, "This shall be done." This was occasionally done in the 1979 Act. For example, it was done when implementing the Valuation Code. The law simply orders the manner in which customs valuation shall be made. The substance and sequence of the criteria to be applied are a virtual copy of the GATT Code. There is no discretion. What Congress said must be done. This type of law binds not only private actors and Executive Branch officials, but also the President. The President cannot change those valuation standards. To change them would require new legislation. (This same approach was used for antidumping and countervailing duties).

The other way to implement an agreement is to give the President power to do what the obligation requires, but not to require him to do it. One example is the provisions of the 1979 Act which implement the Government Procurement Code. The Code obligates governments to give national treatment, as far as procurement procedures are concerned, to all of the signatories to the Code, in the procurement areas specified in

the Code. The implementing act says that the President may change procurement regulations to the extent necessary to comply with the Code. "May," not "shall." The 1979 Act also makes clear that the President may withdraw from compliance at any time. Generally speaking, then, there is really no legal requirement that the President comply with the Procurement Code.

The President's obligation to honor tariff obligations is similarly discretionary. The law authorizes the President to proclaim reduced rates required by obligations, but does not require him to do so. Moreover, all tariff legislation to date gives the President *carte blanche* authority to withdraw such proclamations at any time and for any reason.

A very large part of the United States law which implements international obligations is of this second type. Thus, a very large part of U.S. compliance depends, not on law, but on whatever other, political forces keeps the President doing what he is doing.

The next question that has to be asked about domestic implementation law is the role of the private party. Take the Valuation Code and its implementation. This can be considered a model for 100% implementation. First, the legal standard is incorporated into mandatory domestic law. Next, there is an adjudication procedure which is accessible to everyone affected by the law—an administrative appeals procedure followed by judicial review. And finally, there is a tradition of pretty good administration in this area. The customs administration is not known to be slanted toward domestic interests. Indeed, if there is a slant at all in the United States, it is a slant the other way; there is a tendency to treat the person paying customs duty as a taxpayer fighting with the tax collector.

It is difficult to see how an international tribunal could do better in terms of the day-to-day administration of this act. About the only function of dispute settlement in an area like that is harmonization. When one country goes one way and the other country goes another way, dispute settlement can provide one means of bringing them back together in order to solve the problem. That, however, could be an end-stage process that does not have to be involved in the day-to-day administration of the law.

The other extreme, on the issue of private party rights, is the 1979 law which implements the Standards Code. No private party can complain. The only party that can complain is another signatory government, and another signatory government can complain only if it can allege significant trade damage. This is the same enforcement procedure that ends with a meeting where the President has to decide whether or not to comply.

At this end of the spectrum, dispute settlement clearly has a greater role to play. Even in this case, however, the first priority should be to work on improving the domestic administration of such laws. More enforcement will be obtained by creating private rights of actions within the

domestic system than by asking for some kind of dispute settlement authority which overrides what the government does. It is not an either/or situation, of course. One would still want dispute settlement monitoring—binational decision-making of some kind—at the top of all of these procedures. The point is merely that capital for negotiation should first be spent to improve the domestic law participation of private individuals, if that is possible.

The law which pertains to antidumping and countervailing duties falls in the middle of the two extremes. There is lots and lots of room for participation. There are procedures within procedures and rules on top of rules that allow people to participate in this process. On the other hand, there are frequent complaints about how these laws are working in an ineffective manner, working to create various kinds of trade barriers. The question is whether dispute settlement can contribute to the solution of these problems.

The first step is to be very precise about the kind of complaint. What is wrong and what can be done about it? There is an objectivity problem in the United States (and possibly in Canada as well, because Canada has the same structural problem). Without accusing people of bias in any particular decision, one must recognize that no adjudicatory process should be administered by officials whose supervisor is the chief government officer in charge of political relations with the business community. That is simply not a juridically valid way to adjudicate any issue.

To say that this is a valid complaint does not necessarily mean, of course, that it needs to be solved by international adjudication. It might also be solved by moving the process over to the International Trade Commission, or moving the process into court.

Another problem is the time involved to complete an antidumping or countervailing duty case. Time adds to the expense and harassment factors. Time also delays the point at which more objective judicial review can be sought.

The problem of time also might be solved by internal reforms. It might be solved by having one rather than two agencies make the determination. A lot of smaller things could be done internally, without necessarily going to international adjudication. Indeed, it should be recognized that international procedures tend to move more slowly than domestic procedures.

Finally, there are lots of problems that require changing the substantive law, not the decision-maker. In fact, more objective decision-making might even make things worse unless some substantive provisions are changed.

It is possible, therefore, that dispute settlement procedures might be the answer to none of these problems. All might be handled—better handled—alternatively in terms of changing domestic procedures. The

greater effectiveness of changing domestic laws should at least make this the first option to be considered.

Notwithstanding the above, I think there is a plausible case for using a very "international" approach to the problem of antidumping and countervailing duty laws. A very substantial volume of changes seems to be needed — changes of substance, changes of decision-maker, changes of timing, changes of procedure. To accomplish all this, one could look to establishing binational administration of a new, harmonized law which would be passed by both legislatures. This is really not dispute settlement, however, in the classic sense of treaty interpretation. This would be lifting the entire administration of the law out of national governments into an international setting.

The prospects for such a sweeping solution are obviously problematic, and yet a sweeping solution is probably the only kind that can work. I agree with Louis Sohn that the use of an international appellate tribunal to sit and review the case after it has been decided by a domestic agency is probably the worst of all possible solutions. Once the national governments stake their own decision-making capacity on a particular result, it would take an institution of enormous prestige to be able to reverse them. Nothing so powerful will be involved here.

What about a European Court of Justice reference procedure? I believe the efficacy of such a procedure would depend on the type of case involved. In cases where the government of the importing country is acting against a particular kind of trade that it regards as unfair, and where a remedy is still pending, a reference procedure could be a tremendous delaying device. The first thing that an importer would do in an antidumping duty case would be to take it up to the international tribunal and thus stall the procedure. Unless one can solve that problem in those cases, the reference procedure just does not have much to recommend.

Where, however, the case involves the foreign party who is seeking some affirmative relief from the domestic actions of the other government, such as termination of an existing antidumping or countervailing duty order, then the procedure would at least not have that particular problem.

A larger question is the issue of prestige and stature. The European Court is part of a major integration enterprise. It is part of a larger institution, the institutions of the European Community, which are staffed by some of the most distinguished people, politically and intellectually, in that community. The commissioners are very, very important people and the judges are very, very important people. Their importance is further magnified by the importance of what they are doing. The European Community is a major piece of integration. It goes well beyond the mere elimination of internal barriers to trade. It involves the establishment of a common external tariff, and, more importantly, a truly unified common internal market that extends to investment, services, economic policy and

monetary policy. There is obviously a correlation between the extent of the ambition and the strength of the judicial and other institutions that are created. The prestige of international institutions grows in proportion to the submersion of national sovereignty.

The Canada/U.S. agreement is just not that kind of an agreement. There is not at all the same kind of integration drive behind it. If U.S. protectionism were to declare a 20-year holiday, Canadian enthusiasm for this agreement would drop to approximately zero. Nor is it clear how much power the U.S. Congress wants to share. In short, this agreement simply does not have the strength behind it to create judicial institutions which have the power and prestige of the European Community.

The free trade agreement will need to have some kind of overall adjudicatory body to take care of conflicts and interpretation. The two central questions which pertain to that tribunal seem to be: (1) Should its rulings be "binding?" and, (2) How should it be constituted?

It would obviously be better if rulings were binding. However, I am not sure that it is worth going to the well on that issue. A less binding advisory opinion procedure might be almost as good given the way that "binding" is treated under the American jurisprudence. Consider, also, that the agreement will probably be fairly vague on a number of provisions and, at least as to those, it will be impossible to get anything more than nonbinding opinions. For example, this will be true of services and investment rules.

As for composition, I agree with Louis Sohn that the GATT model of ad hoc panels is wrong here. GATT's ad hoc procedure is not really as ad hoc as it looks, because it is a part of an ongoing institution and community. GATT also gets a great deal of continuity in its procedure from a very able and very respected Secretariat who has a lot of experience. It is true that different panelists are chosen for each case. But when you have seen one Swedish diplomat, you have seen them all. They are all part of the same community. They all have the same kind of GATT experience.

None of this will be true in the Canada-U.S. Free Trade Area. What is needed, therefore, is an adjudicatory institution which is permanent, which has a permanent roster of members and which draws its prestige from other sources. This being a trade agreement, negotiators will probably hear a good deal about the virtues of using various kinds of very wise nonlegal people as decision-makers. In my view, however, an institution like this will have to struggle to maintain adequate prestige. In short, it will need people who will have demonstrated competence in the juridical sciences.

